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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.
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15 RAUL OCHOA MARTINEZ,

16 Defendant.
17

Criminal Case No. 3:12cr627-MMA

[Related Civil Case No. 3:12cv1943-MMA]

**ORDER SUMMARILY DISMISSING
DEFENDANT'S MOTION FOR
REDUCTION OF TIME IN CUSTODY
PURSUANT TO 28 U.S.C. § 2255**

[Doc. No. 36]

18 On March 13, 2012, pursuant to a written plea agreement, Defendant Raul Ochoa Martinez
19 pleaded guilty to a single count Superseding Information for attempted reentry after a previous
20 deportation in violation of Title 8 of the United States Code, sections 1326(a) and (b). *See Plea*
21 *Agreement*, Doc. No. 17. The Court sentenced Defendant on July 3, 2012, to 30 months
22 imprisonment, no fine, and a \$100 penalty assessment. *See Judgment*, Doc. No. 35. Defendant has
23 filed a pre-typed, form motion, requesting the Court reduce his time in federal custody pursuant to
24 28 U.S.C. § 2255, arguing that (1) his imprisonment time is harsher as a non-citizen in violation of
25 his constitutional rights, and (2) a 1995 United States Attorney General Memorandum allows a one
26 to two level downward departure from the applicable guideline sentencing range in return for an
27 alien's concession of deportability and agreement to accept a final order of deportation. For the
28 following reasons, the Court summarily **DISMISSES** the motion.

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1 *Navarro-Botello*, 912 F.2d 318, 322 (9th Cir. 1990). Courts will generally enforce a defendant's
2 waiver of his right to appeal if: (1) "the language of the waiver encompasses the defendant's right to
3 appeal on the grounds claimed on appeal," and (2) "the waiver is knowingly and voluntarily made."
4 *United States v. Martinez*, 143 F.3d 1266, 1270-71 (9th Cir. 1998). The Court concludes that both
5 of these requirements are met in this case. Accordingly, Defendant's motion is barred and must be
6 dismissed because of his plea agreement waiver.

7 Even if Defendant had not waived his right to attack his conviction and sentence, his motion
8 would fail on the merits. Defendant argues that, as a result of his deportable alien status, he has
9 been unable to participate in programs that would entitle him to early release in violation of the
10 Equal Protection Clause of the Fourteenth Amendment. The Ninth Circuit Court of Appeals rejected
11 this argument in *McLean v. Crabtree*, 173 F.3d 1176 (9th Cir. 1999). There, the court held,
12 "[E]xcluding prisoners with detainers from participating in community-based treatment programs,
13 and consequently from sentence reduction eligibility, is at least rationally related to the BOP's
14 legitimate interest in preventing prisoners from fleeing detainers while participating in community
15 treatment programs." *Id.* at 1176. Additionally, Defendant's argument that the Court could depart
16 downward because he is a deportable alien is precluded by statute and current Ninth Circuit case
17 law. By statute, the Court may depart downward only if there are "aggravating or mitigating
18 circumstances . . . not adequately taken into consideration by the Sentencing Commission." 18
19 U.S.C. § 3553(b). Specifically, the Ninth Circuit has held that the threat of deportation is not a
20 factor that the district court may consider for sentencing purposes. *United States v.*
21 *Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990).

22 CONCLUSION

23 Based on the foregoing reasons, the Court summarily **DISMISSES** Defendant's motion for
24 reduction of time in custody.

25 **IT IS SO ORDERED.**

26 DATED: August 13, 2012

27 

28 Hon. Michael M. Anello
United States District Judge